CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 37 **MAY 28, 2003** **NO. 22**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Bureau of Customs and Border Protection

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 4–2003)

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

SUMMARY: The copyrights, trademarks, and trade names recorded with the Bureau of Customs and Border Protection during the month of April 2003. The last notice was published in the CUSTOMS BULLETIN on May 7, 2003.

Corrections or information to update files may be sent to Department of Homeland Security, Bureau of Customs and Border Protection, Office of Regualtions and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: May 9, 2003.

GEORGE FREDERICK MCCRAY, ESQ.
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

05/01/2003
09:19:35

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN APRIL 2003

PAGE 1
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0300027	20030404	20230404	MARIO KART SUPER CIRCUIT	NINTENDO OF AMERICA INC.	N
COP0300028	20030404	20230404	PONY ROCKER RIDE-ON #5-20034	TEK-NEK TOYS INTERNATIONAL INC.	N
COP0300029	20030410	20230410	NDS VERIFIER DIRECTV P04	NEWS DATACOM LIMITED	N
COP0300030	20030410	20230410	YU-GI-OH!	KONAMI CORPORATION	N
COP0300031	20030410	20230410	YU-GI-OH! LEGEND OF BLUE EYES WHITE DRAGON	KONAMI CORPORATION	N
COP0300032	20030410	20230410	YU-GI-OH!TRADING CARD 43973176 (PICTURE OF A DRAGON	KONAMI CORPORATION	N
COP0300033	20030410	20230410	YU-GI-OH! TRADING CARD 18807108 (PICTURE OF RUNES WITH	KONAMI CORPORATION	N
COP0300034	20030410	20230410	YU-GI-OH!TRADING CARD 83764718 (PICTURE OF A BLUE ANKH	KONAMI CORPORATION	N
COP0300035	20030410	20230410	YU-GI-OH!TRADING CARD 71625222 (PICTURE OF CLOCK MONSTE	KONAMI CORPORATION	N
COP0300036	20030410	20230410	YU-GI-OH! EX	KONAMI CORPORATION	N
COP0300037	20030410	20230410	YU-GI-OH!TRADING CARD 1795575 (PICTURE OF COSTUMED	KONAMI CORPORATION	N
COP0300038	20030410	20230410	YU-GI-OH! VOLUME 7	KONAMI CORPORATION	N
COP0300039	20030410	20230410	YU-GI-OH! VOLUME 6	KONAMI CORPORATION	N
COP0300040	20030410	20230410	YU-GI-OH! VOLUME 5	KONAMI CORPORATION	N
COP0300041	20030410	20230410	YU-GI-OH! VOLUME 4	KONAMI CORPORATION	N
COP0300042	20030410	20230410	YU-GI-OH! TRADING CARD 66889139 (PICTURE OF WARRIOR	KONAMI CORPORATION	N
COP0300043	20030410	20230410	YU-GI-OH! TRADING CARD 4723403 (PICTURE OF STAR LIKE	KONAMI CORPORATION	N
COP0300044	20030410	20230410	YU-GI-OH! TRADING CARD 44095762(PICTURE OF PYROTECHNIC	KONAMI CORPORATION	N
COP0300045	20030410	20230410	YU-GI-OH! TRADING CARD 89631139(PICTURE OF BLUE EYES	KONAMI CORPORATION	N
COP0300046	20030410	20230410	YU-GI-OH! TRADING CARD 24094653 PICTURE OF FIRE	KONAMI CORPORATION	N
COP0300047	20030410	20230410	YU-GI-OH! TRADING CARD 54652250 (PICTURE OF YELLOW	KONAMI CORPORATION	N
COP0300048	20030410	20230410	YU-GI-OH! TRADING CARD 28279543 (PICTURE OF YELLOW	KONAMI CORPORATION	N
COP0300049	20030410	20230410	YU-GI-OH! TRADING CARD 46986414 (PICTURE OF PURPLE	KONAMI CORPORATION	N
COP0300050	20030410	20230410	YU-GI-OH! TRADING CARD 74677422 (PICTURE OF PURPLE	KONAMI CORPORATION	N
COP0300051	20030410	20230410	YU-GI-OH! TRADING CARD 91152256 (PICTURE OF YOUNG	KONAMI CORPORATION	N
COP0300052	20030410	20230410	YU-GI-OH! TRADING CARD 31560081 (PICTURE OF WOMEN	KONAMI CORPORATION	N
COP0300053	20030410	20230410	YU-GI-OH! MAGIC RULER	KONAMI CORPORATION	N
COP0300054	20030410	20230410	YU-GI-OH! TRADING CARD 45231177 (PICTURE OF AN	KONAMI CORPORATION	N
COP0300055	20030410	20230410	YU-GI-OH! VOLUME 2	KONAMI CORPORATION	N
COP0300056	20030410	20230410	YU-GI-OH! VOLUME 1	KONAMI CORPORATION	N
COP0300057	20030410	20230410	YU-GI-OH! TRADING CARD 06368038 (PICTURE OF WARRIOR	KONAMI CORPORATION	N
COP0300058	20030410	20230410	YU-GI-OH! VOLUME 3	KONAMI CORPORATION	N
COP0300059	20030410	20230410	YU-GI-OH! STARTER BOX	KONAMI CORPORATION	N
COP0300060	20030411	20230411	YU-GI-OH!TRADING CARDS 15025844 (PICTURE OF BLUE WOMAN	KONAMI CORPORATION	N
COP0300061	20030415	20230415	WINDY WINGS - HUMMINGBIRD HAVING UPWARD FULL TAIL	EXHART ENVIRONMENTAL SYSTEMS INC	N
COP0300062	20030415	20230415	WINDY WINGS - HUMMINGBIRD HAVING DOWNWARD FULL TAIL	EXHART ENVIRONMENTAL SYSTEMS INC	N
COP0300063	20030415	20230415	WINDY WINGS - BUTTERFLY	EXHART ENVIRONMENTAL SYSTEMS INC	N
COP0300064	20030415	20230415	WINDY WINGS - DRAGONFLY	EXHART ENVIRONMENTAL SYSTEMS INC	N
COP0300065	20030415	20230415	WINDY WINGS - HUMMINGBIRD	EXHART ENVIRONMENTAL SYSTEMS INC	N
COP0300066	20030416	20230416	NDS VERIFIER DIRECTV P03	NDS LIMITED	N
COP0300067	20030422	20230419	ENGINEERED ART DECO	MOMENTRENDS, INC. D/B/A ESSENDI	N
COP0300068	20030422	20230108	SEQUIN SHEER DELIGHT	MOMENTRENDS, INC. D/B/A ESSENDI	N
COP0300069	20030423	20230423	FLOWER STICKS	DGE CORPORATION	N
COP0300070	20030423	20230423	ZENWORKS FOR DESKTOPS 4.0	NOVELL INC.	N
COP0300071	20030424	20230424	TIE-DYE DOLPHIN	DGE CORPORATION	N
COP0300072	20030424	20230424	RUBBER DUCKY	DGE CORPORATION	N

SUBTOTAL RECORDATION TYPE 46

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0300227	20030401	20130119	J.A.T.P.	FANTASY INC.	N
TMK0300228	20030401	20120818	GAME BOY	NINTENDO OF AMERICA INC.	N
TMK0300229	20030401	20070107	NAUTECH	NAUTICA APPAREL, INC.	N
TMK0300230	20030401	20101218	DESIGN (NAUTICA SAILBOAT)	NAUTICA APPAREL, INC.	N
TMK0300231	20030401	20110123	NC AND DESIGN	NAUTICA APPAREL	N
TMK0300232	20030401	20071007	NAUTICA COMPETITION (STYLIZED)	NAUTICA APPAREL, INC.	N
TMK0300233	20030401	20120523	TITLEIST	ACUSHNET COMPANY	N
TMK0300234	20030401	20121228	ELDORADO AND DESIGN	ELDORADO COFFEE DISTRIBUTORS LTD	N
TMK0300235	20030401	20121110	FRANCO SARTO	FASHION SHOE LICENSING LLC	N
TMK0300236	20030401	20070324	NAMSB (SERVICE MARK)	NATIONAL ASSOCIATION OF MEN'S	N
TMK0300237	20030401	20110821	BABY GUND AND DESIGN	GUND, INC.	N
TMK0300238	20030401	20090627	GUND	GUND, INC.	N
TMK0300239	20030401	20100808	GUND	GUND, INC.	N
TMK0300240	20030401	20090706	GUND	GUND, INC.	N
TMK0300241	20030402	20121020	OPRAH	HARPO, INC.	N
TMK0300242	20030402	20060430	HAMPSHIRE STUDIO	HAMPSHIRE DESIGNERS, INC.	N
TMK0300243	20030402	20071209	PLANET & CO.	HAMPSHIRE GROUP, LTD.	N
TMK0300244	20030402	20051107	DESIGNERS ORIGINALS	HAMPSHIRE GROUP, LIMITED	N
TMK0300245	20030402	20051031	AMBRA	HAMPSHIRE GROUP, LIMITED	N
TMK0300246	20030403	20121126	D. MAGICIAN GIRL	KONAMI CORPORATION	N
TMK0300247	20030403	20121210	D. MAGICIAN	KONAMI CORPORATION	N
TMK0300248	20030403	20130107	SUMMONED SKULL	KONAMI CORPORATION	N
TMK0300249	20030403	20130318	KONAMI & DESIGN	KONAMI CORPORATION	N
TMK0300250	20030404	20040109	PRESENCE	MONTBLANC NORTH AMERICA LLC.	N
TMK0300251	20030404	20040330	BERETTA	FABRICA D'ARMI P. BERETTA S.P.A.	N
TMK0300252	20030404	20130104	HUBLOT AND DESIGN	MDM SA, GENEVE CORPORATION	N
TMK0300253	20030404	20121117	TIGI	TONI & GUY (USA) LIMITED	N
TMK0300254	20030404	20120211	RED WATCH BEZEL DESIGN	SWISS ARMY BRAND LTD.	N
TMK0300255	20030404	20110205	TIGI	TONI & GUY (USA) LIMITED	N
TMK0300256	20030404	20110605	BED HEAD	TONI & GUY (USA) LIMITED	N
TMK0300257	20030404	20090302	CATWALK	TONI & GUY (USA) LIMITED	N
TMK0300258	20030404	20100925	CONTROL FREAK	TONI & GUY (USA) LIMITED	N
TMK0300259	20030404	20101212	SELF ABSORBED	TONI & GUY (USA) LIMITED	N
TMK0300260	20030404	20121112	IPS	IPS CORPORATION	N
TMK0300261	20030404	20081215	GPC DESIGN ONLY	BWT BRANDS INC.	N
TMK0300262	20030404	20121201	GPC	BWT BRANDS INC.	N
TMK0300263	20030404	20081103	GPC LABEL	BWT BRANDS INC.	N
TMK0300264	20030404	20130504	KNICKS AND DESIGN	MADISON SQUARE GARDEN L.P.	N
TMK0300265	20030407	20070325	SMIRNOFF (BORDERED)	DIAGEO NORTH AMERICA INC.	N
TMK0300266	20030407	20060316	PIERRE SMIRNOFF	DIAGEO NORTH AMERICA INC.	N
TMK0300267	20030407	20051001	CROWN SHIELD FOR SMIRNOFF VODKA	DIAGEO NORTH AMERICA INC.	N
TMK0300268	20030407	20060809	SMIRNOFF	DIAGEO NORTH AMERICA INC.	N
TMK0300269	20030407	20030723	I.P.S. STYLIZED	INDUSTRIAL POLYCHEMICAL SERVICE	N
TMK0300270	20030407	20120804	IPS STYLIZED LETTERING	IPS CORPORATION	N
TMK0300271	20030407	20090714	CHAP-ET	BLOCK DRUG COMPANY, INC.	N
TMK0300272	20030407	20100118	MOSCHINO	MOSCHINO S.P.A.	N
TMK0300273	20030407	20091116	MOSCHINO AND DESIGN	MOSCHINO S.P.A.	N
TMK0300274	20030407	20081013	DESIGN	MOSCHINO S.P.A.	N
TMK0300275	20030407	20110528	MOSCHINO	MOSCHINO S.P.A.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0300276	20030407	20120814	MOSCHINO	MOSCHINO S.P.A.	N
TMK0300277	20030407	20070311	MOSCHINO	MOSCHINO S.P.A.	N
TMK0300278	20030407	20080303	MOSCHINO	MOSCHINO S.P.A.	N
TMK0300279	20030408	20121026	DATALIFE	VERBATIM CORPORATION	N
TMK0300280	20030408	20111123	KETASET	WYETH	N
TMK0300281	20030408	20120929	PREMARIN	WYETH	N
TMK0300282	20030409	20120910	IKTV & DESIGN	TAO MUSIC, INC.	N
TMK0300283	20030410	20120813	LISTERINE POCKETPAKS	WARNER-LAMBERT COMPANY	N
TMK0300284	20030415	20081013	DESIGN	MOSCHINO S.P.A.	N
TMK0300285	20030416	20120928	TRANS AM	SPORTS CAR CLUB OF AMERICA, INC.	N
TMK0300286	20030416	20081018	COLCAFE	INDUSTRIA COLOMBIANA DE CAFE	N
TMK0300287	20030416	20070429	COLCAFE	INDUSTRIA COLOMBIANA DE CAFE	N
TMK0300288	20030416	20050323	PERFECT 10	PERFECT 10, INC.	N
TMK0300289	20030416	20071117	MAUI JIM AND DESIGN	MAUI JIM, INC.	N
TMK0300290	20030416	20060812	MAUI JIM	MAUI JIM, INC.	N
TMK0300291	20030416	20091107	SELLO DORADO	INDUSTRIA COLOMBIANA DE CAFE	N
TMK0300292	20030416	20121105	STEELHEAD	CALLAWAY GOLF COMPANY	N
TMK0300293	20030416	20120924	DESIGN	CALLAWAY GOLF COMPANY	N
TMK0300294	20030416	20120924	ERC II	CALLAWAY GOLF COMPANY	N
TMK0300295	20030416	20121124	DESIGN	LEE KUM KEE COMPANY LIMITED	N
TMK0300296	20030416	20120811	PANDA BRAND	LEE KUM KEE COMPANY LIMITED	N
TMK0300297	20030416	20121029	DESIGN	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0300298	20030417	20110925	THE TINGLER	EVERYTHING FOR LOVE.COM INC.	N
TMK0300299	20030417	20070527	SAUCONY & DESIGN	SAUCONY, INC.	N
TMK0300300	20030417	20110217	SAUCONY	SAUCONY, INC.	N
TMK0300301	20030417	20050827	SAUCONY & DESIGN	SAUCONY, INC.	N
TMK0300302	20030417	20090514	SPOT-BILT & DESIGN	SAUCONY, INC.	N
TMK0300303	20030417	20061007	HIND & DESIGN	SAUCONY, INC.	N
TMK0300304	20030417	20080727	BELDEN	BELDEN WIRE & COMPANY	N
TMK0300305	20030417	20120929	DATATWIST	BELDEN WIRE & COMPANY	N
TMK0300306	20030417	20060611	BELDEN AND DESIGN	BELDEN WIRE & COMPANY	N
TMK0300307	20030417	20070527	NEW GENERATION	BELDEN WIRE & COMPANY	N
TMK0300308	20030417	20071125	MIDIATWIST	BELDEN WIRE & COMPANY	N
TMK0300309	20030417	20101024	MEDIATWIST AND DESIGN	BELDEN WIRE & COMPANY	N
TMK0300310	20030417	20130107	HOMECHOICE	BELDEN WIRE & COMPANY	N
TMK0300311	20030417	20120810	PALMETTO'S	KNIGHT TEXTILE CORPORATION	N
TMK0300312	20030417	20031126	DESIGN (BIFURCATE DEVICE)	BULOVA CORPORATION	N
TMK0300313	20030417	20121214	DESIGN (CONFIGURATION OF AN ALLIGATOR)	LACOSTE ALLIGATOR S.A.	N
TMK0300314	20030421	20120817	CHEMSTRIP	ROCHE DIAGNOSTICS CORPORATION	N
TMK0300315	20030421	20120817	CHEMSTRIP BG (STYLIZED)	ROCHE DIAGNOSTICS CORPORATION	N
TMK0300316	20030422	20121117	FULCRUM DESIGN	ACUSHNET COMPANY	N
TMK0300317	20030422	20050725	MICRO-SHEAR	XURON CORPORATION	N
TMK0300318	20030422	20120507	BLUE DOLPHIN AND DESIGN	K&M ASSOCIATES	N
TMK0300319	20030422	20041004	DESIGN	DEXTER-RUSSELL, INC.	N
TMK0300320	20030422	20080428	DESIGN	DEXTER-RUSSELL, INC.	N
TMK0300321	20030422	20121001	DESIGN	DEXTER-RUSSELL, INC.	N
TMK0300322	20030422	20040906	DESIGN	DEXTER-RUSSELL, INC.	N
TMK0300323	20030422	20091012	BOMBAY SAPPHIRE AND DESIGN	BACARDI & COMPANY LIMITED	N
TMK0300324	20030422	20121217	GEBR. MERKEL SUHL (STYLIZED)	GSI INCORPORATED	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0300325	20030422	20120820	SUHL AND DESIGN	GSI, INCORPORATED	N
TMK0300326	20030422	20081126	GEBRUDER MERKEL SUHL (STYLIZED)	GSI, INCORPORATED	N
TMK0300327	20030422	20120820	DESIGN (RED ELEPHANT)	EASTLAND FOOD CORPORATION	N
TMK0300328	20030422	20050924	ASIAN BEST BRAND & ELEPHANT DESIGN	EASTLAND FOOD CORPORATION	N
TMK0300329	20030424	20130130	NOKOMIS	MAR-LEN SUPPLY, INC.	N
TMK0300330	20030424	20080204	DESIGN (CONFIGURATION OF A HELMET)	H.D. BULLARD COMPANY	N
TMK0300331	20030425	20120122	SPONGEBOB SQUAREPANTS	VIACOM INTERNATIONAL INC.	N
TMK0300332	20030425	20120115	SPONGEBOB SQUAREPANTS	VIACOM INTERNATIONAL INC.	N
TMK0300333	20030425	20120430	SPONGEBOB SQUAREPANTS	VIACOM INTERNATIONAL INC.	N
TMK0300334	20030425	20120924	SPONGEBOB SQUAREPANTS	VIACOM INTERNATIONAL INC.	N
TMK0300335	20030425	20120730	SPONGEBOB	VIACOM INTERNATIONAL INC.	N
TMK0300336	20030425	20041106	DESIGN OF A MAN WALKING	ROYAL ROBBINS, INC.	N
TMK0300337	20030425	20110213	ROYAL ROBBINS	ROYAL ROBBINS, INC.	N
TMK0300338	20030425	20121222	BATH & BODY WORKS	BATHCO, INC.	N
TMK0300339	20030425	20121224	BEAUTY INDIVIDUALIZED ORGANICS	BATH & BODY WORKS, INC.	N
TMK0300340	20030425	20120723	PLANTS IN HARMONY	BATH & BODY WORKS, INC.	N
TMK0300341	20030425	20120806	REALESSENCE	BATH & BODY WORKS, INC.	N
TMK0300342	20030425	20121022	ROOCHI SPORTS	ROOCHI TRADERS, INC.	N
TMK0300343	20030425	20120521	XNTX AND DESIGN	ROOCHI TRADERS, INC.	N
TMK0300344	20030425	20120716	COTTON HERITAGE	ROOCHI TRADERS, INC.	N
TMK0300345	20030429	20120926	BROWN BETTY	BEDESSEE IMPORTS LTD. DBA BROWN	N
TMK0300346	20030429	20100822	HARDHEAD	TONI & GUY (USA) LIMITED	N
TMK0300347	20030429	20120101	EGO BOOST	TONI & GUY (USA) LIMITED	N
TMK0300348	20030429	20121126	UPTIGHT	TONI & GUY (USA) LIMITED	N
TMK0300349	20030429	20100919	MANIPULATOR	TONI & GUY (USA) LIMITED	N
TMK0300350	20030429	20120409	SEXED-UP	TONI & GUY (USA) LIMITED	N
TMK0300351	20030429	20120730	DUMB BLONDE	TONI & GUY (USA) LIMITED	N
TMK0300352	20030429	20110220	MOISTURE MANIAC	MASCOLO BROTHERS LIMITED	N
TMK0300353	20030429	20111009	MULTI-GRIP	BEACON CHEMICAL COMPANY, INC.	N
TMK0300354	20030430	20120730	HEADBANGER	TONI & GUY (USA) LIMITED	N
TMK0300355	20030430	20121006	TARGET DESIGN	MCGUIRE FURNITURE COMPANY	N

SUBTOTAL RECORDATION TYPE 129

TOTAL RECORDATIONS ADDED THIS MONTH 175

RECEIPT OF AN APPLICATION FOR "LEVER-RULE" PROTECTION

AGENCY: Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Frito-Lay, Inc. (hereinafter referred to as "Frito-Lay") seeking "Lever-Rule" protection.

FOR FURTHER INFORMATION CONTACT: Rachel S. Bae, Esq., Intellectual Property Rights Branch, Office of Regulations & Rulings, (202) 572–8875.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Frito-Lay, a wholly owned subsidiary of PepsiCo, Inc., seeking "Lever-Rule" protection. Protection is sought against importations of five certain products not authorized for sale in the United States. The products at issue are the following: CHEETOS cheese puffs (U.S. Patent & Trademark Office [USPTO] Registration No. 752,220; CBP Recordation No. TMK 01–00109), SABRITONES puffed wheat snacks (USPTO Registration No. 1,289,216; CBP Recordation No. TMK 01–00121), DORITOS corn chips (USPTO Registration No. 792,667; CBP Recordation No. 01–00116), SABRITAS potato chips (USPTO Registration No. 2,595,728; CBP Recordation No. TMK 02–00802), and CHURRUMAIS corn strips (USPTO Registration No. 1,469,275; CBP Recordation No. TMK 02–00227). Pursuant to 19 CFR 133.2(f), CBP will publish an additional notice in the CUSTOMS BULLETIN indicating if the specific snack food products will receive Lever-Rule protection in the event that CBP determines that the products are physically and materially different from the Frito-Lay products authorized for sale in the United States.

Dated: May 9, 2003.

GEORGE FREDERICK MCCRAY, ESQ.,
Chief, Intellectual Property Rights Branch,
Office of Regulations and Rulings.

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, May 14, 2003.

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN WORKS TRUCKS AND TRANSAXLES THEREFOR

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of two ruling letters and revocation of treatment relating to the tariff classification of certain works trucks and transaxles therefor under the Harmonized Tariff Schedule of the United States ("HTSUS").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings and to revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of certain works trucks and transaxles therefor. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before June 27, 2003.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, NW, Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 572–8776.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke Headquarters Ruling Letters ("HQs") 954982 and 953670, dated November 17 and July 16, 1993, respectively. Those rulings are set forth as "Attachment A" and "Attachment B", respectively, to this document.

Although in this notice Customs is specifically referring to two rulings, HQ 954982 and HQ 953670, this notice covers any rulings on similar merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, other than the referenced rulings (see above), should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS or other relevant statutes. Any person involved in substantially identical transactions should advise Customs

during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

Pursuant to 19 U.S.C. §1625(c)(1), Customs intends to revoke HQs 954982 and 953670, as they pertain to the classification of certain works trucks and transaxles therefor, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 966332 (*see* "Attachment C" to this document).

Additionally, pursuant to 19 U.S.C. §1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: May 5, 2003.

JOHN ELKINS,
(for Myles B. Harmon, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
Washington, DC, November 17, 1993.

CLA–2 CO:R:C:M 954982 KCC
Category: Classification
Tariff No. 8708.40.10

MR. JOHN MATTSON
NORMAN G. JENSEN, INC.
3050 Metro Drive, Suite #300
Minneapolis, MN 55425

Re: HRL 953670 modified; transaxle; Workman 3000 Series Vehicles; 8704; motor vehicles for the transport of goods; EN 87.08; General EN (III) Parts and Accessories.

DEAR MR. MATTSON:

This is in response to your letter dated September 7, 1993, on behalf of the Toro Company, requesting modification of Headquarters Ruling Letter (HRL) 953670 dated July 16, 1993. That ruling provided the tariff classification of transaxles for the Workman 3000 Series Vehicles under the Harmonized Tariff Schedule of the United States.

Facts:

Based on the information in your letter of November 23, 1992, and the attached brochure, in HRL 953670, we classified transaxles for the Workman 3000 Series Vehicles under heading 8407, HTSUS, as a reciprocating piston engine of a kind used for the propulsion of vehicles of chapter 87, or under heading 8408, HTSUS, as compression-ignition internal combustion piston engine (diesel or semi-diesel). You now state that the facts in HRL 953670 are incorrect because, as imported, the transaxles do not contain engines.

The transaxles under consideration are for the Workman 3000 Series Vehicles which is a relatively small 4-wheel work vehicle with two front seats and an open cargo area for the transportation of merchandise. The vehicle can be used in a variety of settings (park and sports grounds, worksites, factories, agricultural fields, etc.).

The Workman 3000 Series utilizes the Toro transaxle which is incorporated into one die cast aluminum housing. The unit has a 3-speed synchromesh transmission for smooth, easy shifting and quiet operation, a high-low range that delivers six distinct work ratios, a manual difflock to kick in extra traction when required, high efficiency spiral bevel differential gears, and an integrated hydraulic strainer and pump. This component is directly coupled to an engine with an automotive type bell housing, and a clutch to complete an all-enclosed power train. The transaxle precisely delivers power to the rear wheels.

In the current situation, you state that the product to be imported is the transaxle without an engine.

Issue:

What is the classification of the transaxle designed for use in the Workman 3000 Series Vehicles under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. * * *" In HRL 953670, we determined that the Workman 3000 Series Vehicles were classified under heading 8704, HTSUS, which provides for "Motor vehicles for the transport of goods. * * *" We are still of this opinion. See, HRL 953670, pg. 2.

Without an engine, the transaxles are not classifiable as engines under headings 8407 or 8408, HTSUS. We are of the opinion that the transaxles in this case are classified under heading 8708, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705. * * *" Explanatory Note (EN) 87.08 of the Harmonized Commodity Description and Coding System (HCDCS) (pg. 1432) states that "[t]his heading covers parts and accessories of the motor vehicles of headings 87.07 to 87.05, provided the parts and accessories fulfil both the following conditions:

> (i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles; and (II) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Notes)."

EN (III) Parts and Accessories (pg. 1410) states that the headings of Section XVII "* * * apply only to those parts or accessories which comply with all three of the following conditions:

> (a) They must not be excluded by the terms of Note 2 to this Section * * *
> (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 * * *
> (c) They must not be more specifically included elsewhere in the Nomenclature. * * *"

Additionally, EN 87.08 lists exemplars that are classifiable under heading 8708, HTSUS, such as:

> (D) Gear boxes of all types (mechanical, overdrive, preselector, electro-mechanical, automatic, etc.); torque converters; gear box casings; shafts (other than internal parts of engines or motors); gear pinions; direct-drive dog-clutches and selector rods, etc. * * *
>
> (F) Other transmission parts and components for example, propeller shafts, half-shafts; gears, gearing; plain shaft bearings; reduction gear assemblies; universal joints). * * *

The ENs, although not dispositive, are to be looked to for the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The transaxles under consideration are not excluded by the Notes to Section XVII, HTSUS. Based on the information provided, we are of the opinion that the transaxles are solely or principally used with the Workman 3000 Series Vehicles, which are vehicles of heading 8704, HTSUS. Moreover, the transaxles are not more specifically provided for elsewhere in the HTSUS. Therefore, the transaxles under consideration are classified under subheading 8708.40.10, HTSUS, which provides for "* * * Gear boxes * * * For the vehicles of subheading 8701.20, or heading 8702 or 8704."

Holding:

The transaxles without engines for the Workman 3000 Series Vehicle are classified under subheading 8708.40.10, HTSUS, which provides for "Parts and accessories of motor vehicles of headings 8701 to 8705 * * * Gear boxes * * * For the vehicles of subheading 8701.20, or heading 8702 or 8704", which is dutiable at the Column 1 rate of 3.1 percent ad valorem.

HRL 953670 is modified as set forth above.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
Washington, DC, July 16, 1993.

CLA–2 CO:R:C:M 953670 KCC
Category: Classification
Tariff No. 8407.31, 8407.32,
8407.33, and 8408.20.20

MR. JOHN MATTSON
NORMAN G. JENSEN, INC.
3050 Metro Drive, Suite #300
Minneapolis, MN 55425

Re: Transaxle; engine; transmission; clutch; Workman 3000 Series Vehicles; heading 8704; HRL 082797; EN 84.07; EN 84.08.

DEAR MR. MATTSON:

This is in response to your letter of November 23, 1992, which was resubmitted on January 22, 1993, with additional information, regarding the tariff classification of a transaxle for the Workman 3000 Series Vehicles under the Harmonized Tariff Schedule of the United States (HTSUS). Photographs, brochures and specifications were submitted for examination.

Facts:

The article under consideration is a transaxle for the Workman 3000 Series Vehicles. The Workman 3000 is a relatively small 4-wheel work vehicle that features two front seats and an open cargo area for the transport of merchandise. The vehicle can be used in a variety of settings (park and sports grounds, worksites, factories, agricultural fields, etc.) and it comes in a variety of models which are portrayed in the submitted brochure.

The Workman 3000 Series utilizes the Toro transaxle which is incorporated into one die cast aluminum housing. The unit has a 3-speed synchromesh transmission for smooth, easy shifting and quiet operation, a high-low range that delivers six distinct work ratios, a manual difflock to kick in extra traction when required, high efficiency spiral bevel differential gears, and an integrated hydraulic strainer and pump. This component is directly coupled to an engine with an automotive type bell housing, and a clutch to complete an all-enclosed power train.

The information submitted states that the Workman 3300–D has a Mitsubishi 21 h.p., liquid cooled diesel engine used in Toro Groundmaster and Reelmaster products, and the Workman 3200 has a Mitsubishi 27 h.p., liquid cooled gasoline engine used in mini-trucks. The Toro transaxle precisely delivers power to the rear wheels. The attached specification sheets offer data on the transaxle's overall reduction ratios and ground speeds, the P.T.O. gear case assembly, the controls, the input-output shafts, the Bell housing(s)/clutch/flywheel, and L.C. gasoline housing, the external mounting bosses and mounting holes, the hydraulics and lubrication, optional ground speed sensing device, and the component materials (including the aluminum die cast transaxle housing, aluminum die cast P.T.O. gear case and heat treated steel shafts).

Issue:

What is the classification of the transaxle designed for use in the Workman 3000 Series Vehicles under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. * * *" Before we can determine the classification of the transaxle, we must determine the classification of the Workman 3000 Series vehicles. The Workman 3000 Series vehicles are classified under heading 8704, HTSUS, which provides for "Motor vehicles for the transport of goods. * * *" See, Headquarters Ruling Letter (HRL) 082797 dated July 14, 1989, which classified a Mitsubishi lightweight vehicle under heading 8704, HTSUS.

The Harmonized Commodity Description and Coding System (HCDCS) Explanatory Notes (ENs), although not dispositive, are to be looked to for the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). EN 84.07 and EN 84.08 (pgs. 1150 and 1151) state that engines of these headings may be equipped with fuel injection pumps, ignition parts, fuel or oil reservoirs, water radiators, oil coolers, water, oil or fuel pumps, blowers, air or oil filters, clutches or power drives, or starting devices (electric or other). Additionally, the engines may also be equipped with a flexible shaft and fitted with change speed gears.

In this case, the transaxle incorporates an engine, transmission and clutch in one housing. Based on the information presented and gathered by Customs, we are of the opinion that the transaxle is similar to the engines described in EN 84.07 and EN 84.08. EN 84.07 and EN 84.08 allow clutches, power drives and change speed gears to be attached to engines and remain classified as an engine. Therefore, the transaxle is classified as an engine under heading 8407, HTSUS, which provides for "Spark-ignition reciprocating or rotary internal combustion piston engines * * * Reciprocating piston engines of a kind used for the propulsion of vehicles of chapter 87 * * *", or heading 8408, HTSUS, which provides for "Compression-ignition internal combustion piston engines (diesel or semi-diesel engines). * * *"

Holding:

The transaxle with gasoline engine for the Workman 3000 Series Vehicles is classified as a reciprocating piston engine of a kind used for the propulsion of vehicles of chapter 87 under subheadings 8407.31, 8407.32, and 8407.33, HTSUS. Classification to the exact six-digit and eight-digit level is dependent upon the cylinder capacity of the engine.

The transaxle with diesel engine for the Workman 3000 Series Vehicles is classified as compression-ignition internal combustion piston engine (diesel or semi-diesel) under subheading 8408.20.20, HTSUS.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
Washington, DC.

CLA–2 RR:CR:GC 966332 AML
Category: Classification
Tariff No. 8709.90.00

MR. JOHN MATTSON
NORMAN G. JENSEN, INC.
3050 Metro Drive, Suite #300
Minneapolis, MN 55425

Re: Transaxle; Workman 3000 Series Vehicles; HQs 954982 and 953670 revoked.

DEAR MR. MATTSON:

This is in regard to Headquarters Ruling Letters ("HQs") 954982 and 953670, dated November 17 and July 16, 1993, respectively, issued to you on behalf of the Toro Company, regarding the tariff classification of a transaxle for the Workman 3000 Series Vehicles (hereinafter "Workman 3000") under the Harmonized Tariff Schedule of the United States (HTSUS). We have reconsidered the classification determinations made in those rulings and determined that they are incorrect. This letter sets forth the correct classification of both the Workman 3000 and the transaxles therefor.

Facts:

We described the transaxles in HQ 953670 as follows:

> The article under consideration is a transaxle for the Workman 3000 Series Vehicles. The Workman 3000 is a relatively small 4-wheel work vehicle that features two front seats and an open cargo area for the transport of merchandise. The vehicle can be used in a variety of settings (park and sports grounds, worksites, factories, agricultural fields, etc.) and it comes in a variety of models which are portrayed in the submitted brochure.
>
> The Workman 3000 Series utilizes the Toro transaxle which is incorporated into one die cast aluminum housing. The unit has a 3-speed synchromesh transmission for smooth, easy shifting and quiet operation, a high-low range that delivers six distinct work ratios, a manual difflock to kick in extra traction when required, high efficiency spiral bevel differential gears, and an integrated hydraulic strainer and pump. This component is directly coupled to an engine with an automotive type bell housing, and a clutch to complete an all-enclosed power train.

We issued HQ 954982 to modify HQ 953670. Thus, both rulings were issued based on the same operative facts.

Issue:

What is the classification of the transaxle designed for use in the Workman 3000 Series Vehicles under the HTSUS?

Law and Analysis:

Central to the classification of the transaxles is the classification of the Workman 3000 itself. We stated in HQ 953670 that:

> Before we can determine the classification of the transaxle, we must determine the classification of the Workman 3000 Series vehicles. The Workman 3000 Series vehicles are classified under heading 8704, HTSUS, which provides for "Motor vehicles for the transport of goods. * * *" See, Headquarters Ruling Letter (HRL) 082797 dated July 14, 1989, which classified a Mitsubishi lightweight vehicle under heading 8704, HTSUS.

It is this determination that we have reconsidered and now find to be erroneous. The correct analysis and classification are set forth below.

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRIs). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The HTSUS provisions under consideration are as follows:

8704	Motor vehicles for the transport of goods:
	Other, with spark-ignition internal combustion piston engine:
8704.31.00	G.V.W. not exceeding 5 metric tons
* * * * * * *	
8709	Works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors of the type used on railway station platforms; parts of the foregoing vehicles:
8709.90.00	Parts.

The classification of the transaxle must be determined with due consideration of the classification of the Workman 3000 Series vehicles. As detailed in the "facts" section above, the Workman 3000 Series vehicles are subject of ruling HQ 954892 which, in reference to HQ 953670, dated July 16, 1993, classified the Workman 3000 under heading 8704, HTSUS, which provides for "motor vehicles for the transport of goods[.]" However, in a recent request for reconsideration, several rulings concerning the classification of articles that are substantially similar to the Workman 3000 and classify those articles as works trucks under heading 8709, HTSUS were identified.

The rulings cited are as follows:

In HQ 965246, dated November 6, 2001, after considering and distinguishing the characteristics of articles classifiable under heading 8704 and 8709, HTSUS, we classified a "Micro Truk" under heading 8709, HTSUS as a works truck. In so doing, we emphasized "certain design features" that are common to such articles:

> Among these are their construction and special design features which make them unsuitable for the transport of goods by road or other public ways; their top speed when laden is generally not more than 30 to 35 km/h; their turning radius is approximately equal to the length of the vehicle itself; vehicles of heading 8709 do not usually have a closed driving cab, the accommodation for the driver often being no more than a platform on which to stand. HQ 965246 at page 3.

In New York Ruling Letter ("NY") G87244, dated February 27, 2001, we classified a John Deere 1800 Utility vehicle under heading 8709, HTSUS, as a works truck. In so classifying the article we emphasized its design features and characteristics as follows:

> It is a four-wheel, self-propelled utility vehicle and is used to haul materials in factories and warehouses and on golf courses, sports fields and nurseries. It has a 4-cycle, gasoline, 18 horsepower engine that can attain a maximum speed of 11.5 mph. The vehicle has a two-speed transaxle and large-diameter tires for traction. The vehicle has an open operator's platform and comes with a cargo box capable of hauling materials up to 1500 lbs. The tailgate can be removed and the sides lowered to provide a flatbed surface. The vehicle's turning radius (120.5 inches) is approximately equal to its length (102 inches). You state that the vehicle does have attachments. It has a sun canopy kit to shield the operator from inclement weather. It also has an auxiliary hydraulics kit to power attachments and a Cushman TD1500 Top Dresser. The Cushman Core Harvester and a cradle attachment can also be adapted to the John Deere 1800 Utility Vehicle. NY G87244 at 1.

We reached similar conclusions, *i.e.*, we classified vehicles similar to the Workman 3000 under heading 8709, HTSUS, in several other rulings: NY C83109, dated January 29, 1998, in which the John Deere Gator Utility vehicle was so classified; HQ 960303, dated May 13, 1997, in which the Club Car utility vehicle was so classified; HQ 954173, dated September 22, 1993, in which the Mule utility vehicle was so classified.

We also considered the determinations made in HQs 082797, dated July 14, 1989, and 086305, dated January 24, 1990, both of which concerned the classification of the Mighty Mits line of lightweight work vehicles under heading 8704, HTSUS. HQ 086305 modified HQ 082797 as it pertained to the Mighty Mit model equipped with a dumper. We have examined those files, the images and literature contained therein and conclude that the articles therein in question were, given the evidence presented, properly classified. That is, the Mighty Mits, because of several design features that do not comport with those described in the ENs to heading 8709, HTSUS, set forth below, are readily distinguishable from the Workman 3000 articles before us.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while

neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to heading 8709, HTSUS, provide, in pertinent part, as follows:

> This heading covers a group of self-propelled vehicles of the types used in factories, warehouses, dock areas or airports for the short distance transport of various loads (goods or containers) or, on railway station platforms, to haul small trailers.
>
> Such vehicles are of many types and sizes. They may be driven either by an electric motor with current supplied by accumulators or by an internal combustion piston engine or other engine.
>
> The main features common to the vehicles of this heading which generally distinguish them from the vehicles of heading 87.01, 87.03 or 87.04 may be summarised as follows:
>
> (1) Their construction and, as a rule, their special design features, make them unsuitable for the transport of passengers or for the transport of goods by road or other public ways.
>
> (2) Their top speed when laden is generally not more than 30 to 35 km/h.
>
> (3) Their turning radius is approximately equal to the length of the vehicle itself.
>
> Vehicles of this heading do not usually have a closed driving cab[.]
>
> * * * * * * *
>
> Works trucks are self-propelled trucks for the transport of goods which are fitted with, for example, a platform or container (sometimes designed for elevating) on which the goods are loaded.
>
> * * * * * * *

The evidence provided establishes that the Workman 3000 is a small, 4-wheeled, self-propelled work vehicle with two front seats and an open cargo area in the rear designed for the short distance transport of merchandise. The turning radius is less than the length of the vehicle, its top speed without load is less than 25 miles per hour, and none of the models are equipped with lifting or handling equipment. The vehicles are marketed to be used for landscaping, facility maintenance, agricultural and warehouse use. Given the apparent descriptive similarity of the Workman 3000 to other works trucks classified under heading 8704, HTSUS (which were subject of the prior rulings discussed at length above), we compared the image of the Workman 3000 with the images of those vehicles provided on their respective websites. We conclude following this visual comparison that the Workman 3000 is substantially similar in form and intended use to those vehicles.

Based upon the holdings of the rulings cited above and the satisfaction of the criteria set forth in the ENs, we conclude that the Workman 3000 is properly classified under heading 8709, HTSUS, as a works truck. Accordingly, those rulings that classify the Workman 3000 under headings other than 8709, HTSUS, are being revoked.

The ENs to heading 8709, HTSUS, provide, pertaining to the classification of parts, the following:

> This heading also covers parts of the vehicles specified in the heading, provided the parts fulfil both the following conditions:
>
> (i) They must be identifiable as being suitable for use solely or principally with such vehicles; and
>
> (ii)They must not be excluded from this heading by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).
>
> Parts of this heading include:
>
> (6) Axles.

The evidence presented is that the transaxles at issue are designed and manufactured solely for use in the Workman 3000. Thus, they are classifiable as parts of a works truck under heading 8709, HTSUS.

Holding:

The transaxle for the Workman 3000 Series Vehicles is classified under subheading 8709.90.00, HTSUS, which provides for, *inter alia*, parts of works trucks.

Effect on Other Rulings:

HQs 954982 and 953670 are REVOKED.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
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Senior Judges

Nicholas Tsoucalas
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Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 03–49)

FORMER EMPLOYEES OF TYCO ELECTRONICS, FIBER OPTICS DIVISION, PLAINTIFFS *v.* U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 02–00152

[Plaintiffs' Motion for Judgment Upon the Agency Record is denied. The Department of Labor's negative determination is remanded for further investigation.]

(Dated May 12, 2003)

Williams Mullen, (Jimmie V. Reyna, Francisco J. Orellana), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, *John N. Maher,* Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jay Reddy,* Office of the Solicitor, U.S. Department of Labor, Of Counsel, for Defendant.

OPINION

CARMAN, *Chief Judge:* This matter comes before the Court on Plaintiffs' Motion for Judgment Upon the Agency Record pursuant to USCIT Rule 56.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(d) (2000). Plaintiffs challenge the United States Department of Labor's ("Labor") determination entitled Notice of Negative Determination On Reconsideration on Remand *("Remand Results").* (Pub. Supplemental Admin. R. at 15–18); *see also Tyco Electronics, Fiber Optics Division; Glen Rock, PA; Notice of Negative Determination on Reconsideration on Remand,* 68 Fed. Reg. 5,655 (Feb. 4, 2003). As set forth below, this Court holds that the *Remand Results* are not supported by substantial evidence or otherwise in accordance with law. Therefore, this matter is remanded to Labor for further investigation consistent with the specific instructions contained herein.

STANDARD OF REVIEW

This Court will uphold Labor's determination of eligibility for trade adjustment assistance "if it is supported by substantial evidence on the record and is otherwise in accordance with law." *Former Employees of*

Swiss Indus. Abrasives v. United States, 830 F. Supp. 637, 639 (Ct. Int'l Trade 1993) (citations omitted); *see also* 19 U.S.C. § 2395(b). Pursuant to 19 U.S.C. § 2395(b),

> The findings of fact by the Secretary of Labor * * *, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

19 U.S.C. § 2395(b) (2000). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *see also Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Further, Labor's findings of fact must be supported by reasonable analysis and not be arbitrary and capricious. *Former Employees of Marathon Ashland v. Chao*, 215 F. Supp. 2d 1345, 1350 (Ct. Int'l Trade 2002) (citation omitted).

Although "the nature and extent of the investigation are matters resting properly within the sound discretion of [Labor]," *Former Employees of CSX Oil & Gas Corp. v. United States*, 720 F. Supp. 1002, 1008 (Ct. Int'l Trade 1989) (quoting *Cherlin v. Donovan*, 585 F. Supp. 644, 647 (Ct. Int'l Trade 1984)), "good cause to remand exists if [Labor's] chosen methodology is so marred that [the] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Galey & Lord Indus. v. Chao*, 219 F. Supp. 2d 1283, 1286 (Ct. Int'l Trade 2002) (citations omitted). Under § 2395(c), this Court "shall have jurisdiction to affirm the action of the Secretary of Labor * * * or to set such action aside, in whole or in part." 19 U.S.C. § 2395(c).

BACKGROUND

Plaintiffs, the former employees of the Tyco Electronics Plant, Fiber Optics Division located in Glen Rock, Pennsylvania ("Former Employees"), sought certification for North American Free Trade Transitional Adjustment Assistance ("NAFTA-TAA") benefits on July 27, 2001. (Pub. Admin. R. at 2.) Former Employees sought certification under 19 U.S.C. § 2331.[1] Section 2331(a)(1) provides:

> A group of workers * * * shall be certified as eligible to apply for adjustment assistance under this subchapter * * * if [Labor] determines that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have

[1] Congress recently repealed 19 U.S.C. § 2331, folding the NAFTA-TAA program into a new trade adjustment assistance scheme under the newly-revised version of the Trade Act of 1974 renamed the Trade Act of 2002. *See* Pub. L. No. 107–210, § 123, 116 Stat. 933, 944 (2002). Because Former Employees' petition antecedes November 4, 2002, the effective date of the revised statute, they cannot benefit from the terms of the revised statute. *See id.* at § 151, 116 Stat. 953–954.

become totally or partially separated, or are threatened to become totally or partially separated, and either—

(A) that—

(i) the sales or production, or both, of such firm or subdivision have decreased absolutely,

(ii) imports from Mexico or Canada of articles like or directly competitive with articles produced by such firm or subdivision have increased, and

(iii) the increase in imports under clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

(B) that there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly competitive with articles which are produced by the firm or subdivision.

19 U.S.C. § 2331(a)(1) (2000).

Plaintiffs sought certification for benefits based on their belief that their job loss was a result of an increase in imports from Mexico and a result of a shift in production of fiber optic components to Mexico. (Pub. Admin. R. at 53.) According to the Former Employees, several other Tyco facilities in the Pennsylvania area had closed and all recent petitions for NAFTA-TAA had been granted. (*Id.* at 51.) The Pennsylvania Department of Labor and Industry initiated a preliminary investigation and denied the Former Employees' petition based on insufficient import information regarding like products and Tyco Electronic's initial survey response. (Conf. Admin. R. at 12–14.) The United States Department of Labor initiated an investigation of the Former Employee's NAFTA-TAA certification eligibility petition on September 4, 2001. *Investigations Regarding Certifications of Eligibility to Apply for NAFTA Transitional Adjustment Assistance,* 66 Fed. Reg. 48,708 (Sept. 21, 2001).

In the initial investigation, Labor denied the Former Employees' NAFTA-TAA petition on the grounds that imports from Mexico did not contribute importantly to the Former Employees' separation and there was no shift in production to Mexico. *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 66 Fed. Reg. 53,250, 53,252 (Oct. 19, 2001). The initial investigation consisted of one form letter data request sent to Tyco Electronics. (Conf. Admin. R. at 33–34.) In its written determination, Labor found that the predominant cause of the work separation was related to a shift in production to an affiliated Tyco Electronics facility in Harrisburg, Pennsylvania. (Pub. Admin. R. at 19.)

On October 9, 2001, Former Employees filed a motion for administrative reconsideration of Labor's negative NAFTA-TAA determination, contending that their job separation was caused by a shift in production to Mexcio. (*Id.* at 54.) Based upon additional information provided during a conference call with Tyco Electronics company officials, Labor denied Former Employees' request for administrative reconsideration.

Tyco Electronics Fiber Optics Division, Glen Rock, Pennsylvania; Notice of Negative Determination Regarding Application for Reconsideration, 67 Fed. Reg. 5,299 (Feb. 5, 2002). Labor stated that only "a negligible portion of the plant production was shifted to Mexico during the relevant period." (Pub. Admin. R. at 69.)

Appearing pro se, Former Employees appealed the negative determination by filing a complaint in this Court on January 30, 2002. (Pls.' Compl. at 1.) Plaintiffs' counsel was appointed by the Court to represent the Former Employees pro bono. Pursuant to the Court's scheduling order, Plaintiffs filed a Rule 56.1 Motion for Judgment Upon the Agency Record on June 28, 2002. Immediately after the Former Employees filed their Rule 56.1 Motion, Defendants sought Plaintiffs' consent to a voluntary remand. In seeking a voluntary remand, Defendant stated that "[a]fter review of the administrative record in light of the arguments petitioners made in their Rule 56.1 motion, defendant seeks a remand to Labor to conduct a further investigation and make a redetermination." (Def.'s Unopposed Mot. for Voluntary Remand at 2.)

On August 7, 2002, this Court issued an order that Defendant conduct a remand investigation and submit remand results by October 7, 2002. *Former Employees of Tyco Elecs. v. United States,* No. 02–00152 (Ct. Int'l Trade Aug. 7, 2002) (order granting voluntary remand) ("Remand Order"). The Remand Order mandated that Labor "conduct further investigation, * * * [and] collect further evidence, including evidence from the plaintiffs." *Id.* at 1. Labor failed to timely comply with the Court's order and did not submit a remand determination to this Court on or before October 7, 2002. On October 17, 2002, Plaintiffs submitted information to Defendant's counsel for use in the remand determination ("October 17 information"). (Pls.' Br. at 5; Def.'s Br. at 9.) On November 12, 2002, Plaintiffs contacted Defendant to inquire about the status of the remand investigation. *Former Employees of Tyco Elecs. v. United States*, No. 02–00152, 2003 Ct. Intl. Trade LEXIS 23, at *3 (Ct. Int'l Trade March 5, 2003) (order granting Defendant leave to file out of time and awarding Plaintiffs attorney's fees). At that time, Defendant's counsel informed Plaintiffs' counsel that the remand investigation had not started. *Id.* On November 14, 2002, Defendant filed its first motion for leave to file the remand results out of time, requesting until January 6, 2003 to file the results. *Id.* On January 2, 2003, Defendant filed a second motion for leave to file the remand results out of time. *Id.* In its second motion, Labor requested until January 21, 2003 to file the results. *Id.* The *Remand Results* were filed with the Court on January 17, 2003. *Id.* at *4. This Court accepted the *Remand Results* out of time and awarded Plaintiffs' attorney's fees under USCIT Rule 16(f). *Id.* at *19.

In conducting the remand investigation, Labor contacted a Tyco Electronics company official and requested company-wide sales figures of the fiber optics components produced at the Glen Rock plant and a list of the major declining customers of the subject plant. (Pub. Supplemental Admin. R. at 2.) Tyco Electronics reported declining sales in its fiber op-

tics division during the relevant time period. (Conf. Supplemental Admin. R. at 5.) Because of the reported declining sales, Labor surveyed the two reported major declining customers regarding their purchases of fiber optics components during the relevant time period. (Pub. Supplemental Admin. R. at 17.) According to Labor, the surveys revealed that one customer did not increase its imports of like products or products competitive with the items produced at the Glen Rock plant. (*Id.* at 18.) The other customer reported no direct import purchases during the relevant period and a "relatively low" amount of indirect imports during the latter part of the relevant period. (*Id.*) Based on these findings, Labor "affirm[ed] the original notice of negative determination of eligibility." (*Id.*)

Plaintiffs filed their second Rule 56.1 Motion for Judgment Upon the Agency R. on February 24, 2003. (Pls.' Br. at i.) Plaintiffs ask this Court to certify the Former Employees for NAFTA-TAA eligibility or, alternatively, order an additional remand "with specific instructions [to Labor] on how to conduct a fair and meaningful investigation." (*Id.* at 28.) In Defendant's Response to Plaintiffs' second Rule 56.1 Motion, Labor opposes certification of eligibility but concedes that a second remand is necessary because the *Remand Results* "are not consistent with * * * the Court's order." (Def.'s Br. at 9.)

PARTIES' CONTENTIONS

I. Plaintiffs' Contentions

Plaintiffs contend that the *Remand Results* are not supported by substantial evidence or otherwise in accordance with law for the following six reasons. First, Plaintiffs contend that the Remand Results are inconsistent with instructions in this Court's Remand Order. (Pls.' Br. at 8–10.) Second, Former Employees assert that the *Remand Results* inappropriately rely on the underlying investigation which Labor conceded was inadequate. (*Id.* at 10–11.) Third, Plaintiffs contend that the *Remand Results* are not supported by substantial evidence given the fact that the remand investigation consisted of only two unverified customer surveys. (*Id.* at 12–14.) Fourth, Plaintiffs contend that the *Remand Results* fail to address the statutory criteria under 19 U.S.C. § 2331(a)(1)(B) because Labor failed to investigate whether there was a shift in production. (*Id.* at 14–16.) Fifth, Former Employees contend that the *Remand Results* are contrary to law because Labor's decision to reject the October 17 information was arbitrary and capricious. (*Id.* at 16–18.) Sixth, Plaintiffs contend that the *Remand Results* should be rejected because Labor failed to verify information provided by Tyco Electronics and its customers, failed to address relevant import data, failed to examine Tyco's corporate organizational structure, and failed to conduct its investigation with the utmost regard for the interests of Plaintiffs. (*Id.* at 18–26.) Plaintiffs assert that the proper remedy is for the Court to order Labor to certify the Former Employees' eligibility for NAFTA-TAA benefits. (*Id.* at 26–28.) Alternatively, Plaintiffs ask this

Court to remand to Labor with specific instructions to conduct a meaningful and fair investigation. (*Id.* at 28.)

First, regarding the merits of the *Remand Results*, Plaintiffs contend that the *Remand Results* are inconsistent with the instructions in this Court's Remand Order. (*Id.* at 8–10.) Plaintiffs note that this Court's Remand Order specifically instructs Labor "to conduct further investigation, [and] to collect further evidence, including evidence from the plaintiffs." (*Id.* at 8.) Plaintiffs contend that the *Remand Results* are "devoid" of any information from Former Employees. (*Id.* at 9.) Plaintiffs assert that although Defendant's counsel informed Plaintiffs that it would be improper for Labor to consider the October 17 information voluntarily submitted by Plaintiffs, Labor did not attempt to obtain any other information from the Plaintiffs as instructed to do so in the Remand Order. (*Id.*)

Second, Plaintiffs contend that the *Remand Results* inappropriately rely on the initial investigation which Defendant conceded was inadequate. (*Id.* at 10–11.) Plaintiffs cite to Defendant's Unopposed Motion for Voluntary Remand, in which Labor states that if the remand investigation results in a "reaffirmation of Labor's previous [negative] determination," Labor will support its conclusion with "a more detailed factual and/or legal analysis." (*Id.* at 10 (citing Def.'s Unopposed Mot. for Vol. Remand at 2) (emphasis omitted).) However, Former Employees argue that the *Remand Results* lack such detailed analysis and merely reiterate the concededly inadequate initial investigation findings. (*Id.*)

Next, Plaintiffs contend that the *Remand Results* are not supported by substantial evidence given the fact that the remand investigation consisted of only two unverified customer surveys. (*Id.* at 12–14.) Although the *Remand Results* state that one customer decreased sales from the Tyco facility and did not increase its imports of like products, Plaintiffs contend that Labor fails to explain how this fact is relevant to a shift in production of fiber optic components to Mexico. (*Id.* at 13.) Plaintiffs also contend that "any data that show that sales with the U.S. plant decreased, while imports did not increase would indicate * * * a shift of sourcing to Mexican imports." (*Id.*) Plaintiffs contend that the second customer survey cannot be the basis for a reasoned analysis because it contained incomplete responses that were supplemented by information whose source was unidentified in the record. (*Id.* at 14.) Additionally, Former Employees assert that the declining sales data provided by the customers "should have prompted [Labor] to conduct an import analysis to see if imports of the product in question increased during the investigation period." (*Id.* at 15.)

Fourth, Plaintiffs emphasize that Labor failed to address the statutory criteria under 19 U.S.C. § 2331(a)(1)(B) because the investigation did not examine whether there was a shift in production. (*Id.* at 14–16.) Plaintiffs contend that Labor focused exclusively on sales data and the information from two customers, and did not consider any production data. (*Id.* at 15.) Former Employees contend that Labor is required to

certify a group of workers for NAFTA-TAA benefits if there is "a link between sales, production and import data, *or* [if there is] a shift in production to Mexico." (*Id.* at 15.) Plaintiffs contend that in the *Remand Results* Labor ignored the second possible basis for eligibility. (*Id.* at 15–16.)

Next, Plaintiffs argue that the *Remand Results* are contrary to law because Labor's decision to reject the October 17 information was arbitrary and capricious. (*Id.* at 16.) Although not a part of the administrative record, Plaintiffs contend that the October 17 information is "highly relevant to the investigation" and contains some information which is readily available to Labor, yet was ignored during the entire investigation. (*Id.* at 17.) According to Plaintiffs, the October 17 information includes the following: Tyco Electronics employee surveys; Tyco Electronics shipping documents; United States and Mexico trade data concerning fiber optic products from Mexico; and a June 2001 United States Customs Service Tariff Classification ruling letter on fiber optic products from Mexico made in response to a Tyco Electronics ruling request. (Pls.' Br. at Ex. 1.) Plaintiffs contend that "rejection of the data, and the failure of [Labor] to pursue the investigatory leads suggested by the data was arbitrary and capricious." (*Id.* at 17.)

Sixth, Plaintiffs contend that the *Remand Results* should be rejected because Labor failed to meet the threshold requirements for conducting an adequate investigation. (*Id.* at 19.) Plaintiffs contend that Labor should not have accepted unverified information from Tyco Electronics regarding the alleged shift in production to Tyco Electronics' Harrisburg, Pennsylvania plant. (*Id.* at 20.) Plaintiffs contend that the circumstances surrounding other recent Tyco plant closings should have prompted Labor to seek independent corroboration of the provided information. (*Id.*) Former Employees note that two plants that produced the same articles as the plant in question received positive NAFTA-TAA eligibility determinations within months of the investigated time frame in this case. (*Id.* (citing *AMP, Inc., a Tyco International Ltd. Company, Fiber Optic Division, Middletown, Pennsylvania; Notice of Revised Determination on Reconsideration,* 65 Fed. Reg. 16,226 (Mar. 27, 2000); *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 66 Fed. Reg. 54,783, 57,784 (Oct. 30, 2001)).) Plaintiffs contend that Labor failed to conduct any import analysis even though the *Remand Results* state that certification was denied because increased imports did not contribute importantly to Former Employees' job separation. (*Id.* at 23.) Further, Plaintiffs contend that because Tyco Electronics is part of a larger corporate structure, Labor should have examined the corporate organization and the possibility of a two-step shift in production to Mexico. (*Id.* at 24.) Plaintiffs acknowledge Tyco Electronics' explanation that at the time Former Employees were separated from their job, the Glen Rock plant was a "quick turn around" production facility of items produced at the Mexican plant. (*Id.* at 24–25.) However, Plaintiffs ques-

tion why Labor did not investigate Former Employees' claim that production was transferred during an earlier period of time from the Glen Rock facility to Mexico and the Glen Rock facility was merely kept open for a brief period following this shift in production in order to conduct quality assurance of the products from Mexico. (*Id.* at 25.)

In response to Labor's concession that a second remand is necessary in this case, Plaintiffs contend that this concession should be closely examined. (Pls.' Reply Br. at 9.) According to Plaintiffs, Labor asserts that the October 17 information was considered and that Labor merely failed to address the information in the *Remand Results*. (*Id.* at 3.) However, Plaintiffs contend that prior to this filing, "Defendant's position had been that [Labor] had not considered the [October 17 information]." (*Id.*) Former Employees contend that "[o]ral and written statements between counsel indicate that the October 17 information was never considered by Defendant." (*Id.*) According to Plaintiffs, in December 2002, when counsel were engaged in discussions regarding Labor's request to file the *Remand Results* out of time, Defendant's counsel informed Plaintiffs' counsel that Labor would not consider the October 17 information because to do so would be "improper" because the information was not gathered by Labor and therefore, not "officially part of the record." (*Id.* at 4.) Further, Plaintiffs contend that when Defendant sought Plaintiffs' consent for another voluntary remand on March 5, 2003, Defendant's counsel indicated that an additional remand was necessary so that Labor could consider the October 17 information. (*Id.*) Plaintiffs conclude by stating that "[i]t is not credible that Labor considered [the October 17] information, but failed to cite its findings in the [*Remand Results*], *and* failed to include the information in the remand record, and in the supplementary remand record supplied to the Court." (*Id.* at 5.)

Former Employees contend that a remand merely to allow Labor to "rewrite the remand investigation" to include a statement that it considered the October 17 information without ordering further investigation will not be serve the purposes of the Court. (*Id.* at 6.) Plaintiffs urge this Court, if an additional remand is found to be appropriate, to provide specific instructions to Labor to thoroughly consider and evaluate the October 17 information. (*Id.*)

II. Defendant's Contentions

In its response to Plaintiffs' Rule 56.1 Motion, Labor contends that although the remand investigation was conducted in good faith, the investigation "contains deficiencies." (Def.'s Br. at 8.) However, Defendant contends that "Labor did consider [the October 17] information collected by the Plaintiffs in making its determination." (*Id.* at 9.) Defendant acknowledges that "Labor failed to formally acknowledge receipt of the evidence, document findings in light of the evidence, and did not articulate a rationale concerning what effect the evidence had upon the investigation." (*Id.*) Defendant concedes that the remand results

are not consistent with the Court's Remand Order; therefore, the case should be remanded to Labor again. (*Id.*)

Defendant contends that it is inappropriate for the Court to certify Plaintiffs for eligibility to receive NAFTA-TAA benefits. (*Id.*) Defendant asserts that the cases cited by Plaintiffs in support of their argument that this Court should order certification ar distinguishable from the case at bar. (*Id.* at 10–11.) Defendant states that in *United Electric Radio*, the Court ordered Labor to certify the plaintiffs only after 5 inadequate remand investigations. (*Id.* at 10 (citing *United Elec. Radio and Machine Workers of Am. v. Martin*, 15 CIT 299 (1991)).) Further, Defendant contends that in *Former Employees of Hawkins Oil and Gas*, the Court waited until after the third inadequate remand investigation before ordering certification. (*Id.* at 11 (citing *Former Employees of Hawkins Oil and Gas, Inc. v. United States Dep't of Labor*, 814 F. Supp. 1111 (Ct. Int'l Trade 1993)).) Finally, Defendant distinguishes *Former Employees of Barry Callebaut*, by stating that the Court did not order certification until after the fourth inadequate investigation. (*Id.* (citing *Former Employees of Barry Callebaut v. Herman*, 240 F. Supp. 2d 1214, 1228 (Ct. Int'l Trade 2002)).) Defendant contends that in all three cases, "the Court relied upon measures short of certification before reaching the decision to order certification." (*Id.* at 11.) Further, Labor argues that ordering certification is only a "last resort" and the Court must find that a remand would be futile. (*Id.*) Defendant contends that a second remand in this case will "allow[] Labor to acknowledge, address, and make a part of the record" the October 17 information. (*Id.* at 12.)

Additionally, Labor contends that "this Court does not possess the authority to certify [Plaintiffs] in the absence of a finding [by Labor] that the statutory criteria have been satisfied." (*Id.*) Defendant contends that "there is no constitutional or statutory authority that empowers the Court to order Labor to certify [Plaintiffs] when no finding has been made by Labor that the statutory requirements for certification have been met." (*Id.* at 13.) Defendant contends that although the Court can "*remand* a case to Labor for further evidence," the Court cannot "simply express its impatience over Labor's purported failure to conduct an 'adequate investigation' and direct labor to 'certify the employees' for the requested benefits." (*Id.* at 13–14.) Defendant concludes by stating that "this Court would exceed its authority by ordering Labor to certify [Plaintiffs] in the absence of a finding by Labor that the statutory requirements have been met." (*Id.* at 15.)

ANALYSIS

I. An Additional Remand is Necessary.

Although Labor has had four bites at this apple: 1) Plaintiffs' initial petition; 2) Plaintiffs' request for reconsideration; 3) Plaintiffs' complaint in this action; and 4) the remand ordered on August 2002, the Court finds that an additional remand is necessary and directs Labor to conduct further investigation and analysis concerning Plaintiffs' re-

quest for certification of eligibility to receive NAFTA-TAA benefits. On remand, the Court instructs Labor to address the following issues.

A. Labor shall consider and analyze the October 17 information.

As Labor concedes, the *Remand Results* are in direct violation of this Court's Remand Order because they do not contain any information gathered from Plaintiffs. The Court finds that Labor's failure to collect any information from Plaintiffs, as well as Labor's rejection of the October 17 information voluntarily submitted by the Plaintiffs was a result of Labor's arbitrary and capricious treatment of this remand investigation. According to Plaintiffs, the October 17 information includes Tyco Electronics employee surveys as well as potentially relevant import data. (Pls.' Br. at 16–17.) Before the Court can consider the merits of Plaintiffs' claims, it is necessary for this information to be considered by Labor and made a part of the administrative record. The Court is not persuaded by Defendant's contentions that Labor considered the October 17 information submitted by Plaintiffs and merely failed to address such information in the *Remand Results*. On remand, Labor should detail its analysis and evaluation of the October 17 information. Labor is encouraged to conduct any further investigation that might be necessary to resolve any inconsistencies that are revealed in its analysis of the October 17 information versus the statements of Tyco Electronics company officials.

B. Labor shall consider the propriety of conducting an import analysis to support the scant import information provided by the customer surveys.

In the *Remand Results*, Labor concluded that Former Employees failed to qualify for NAFTA-TAA because Former Employees failed to meet the criteria under 19 U.S.C. § 2331(a)(1)(A)(iii): any increase in imports did not "contribute[] importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision." (Pub. Supplemental Admin. R. at 18); *see also* 19 U.S.C. § 2331(a)(1)(A)(iii). This conclusion is based upon two customer surveys conducted after Labor had requested Tyco's sales figures for the relevant time periods. (*Id.* at 17–18.) One customer survey was properly completed and contains information that could have aided Labor's investigation. However, the other customer survey has incomplete sales and import data and does not seem to provide any helpful information for Labor's investigation. Regarding this second customer survey, Labor states in the *Remand Results* that "[one] major customer reported no direct import purchases during 1999, 2000 and January through September 2001. However, this customer reported that a small percentage of the products purchased were indirect imports (products purchased from a domestic source that were wholly manufactured in a foreign country) during September 2001." (*Id.* at 18.) This statement seems to be only partly correct. Although this customer did in fact "report[] no direct import purchases during 1999, 2000 and January through September 2001" (Pub. Supplemental Admin. R. at 18), this customer failed

to include *any* information for 1999 or 2000. (Conf. Supplemental Admin. R. at 10.) The missing purchase information for this customer was supplied by a Tyco Electronics company official. (*Id.* at 13–14.) The Court finds Labor's reliance on such incomplete customer surveys to be insufficient to support Labor's conclusion. Further, Labor failed to conduct any independent import analysis which might have substantiated or contradicted the information reported by the customers. Therefore, the Court instructs Labor to reconsider its determination regarding Plaintiffs' eligibility under 19 U.S.C. § 2331(a)(1)(A) and conduct further investigation if necessary to determine if imports "contributed importantly" to the Former Employees' loss of jobs. Additionally, Labor is instructed to assist the Court in understanding the seemingly contradictory sales information provided by Tyco Electronics for the articles produced at the Glen Rock facility for January—September 2000 and 2001. (*Compare* Conf. Admin. R. at 34, *with* Conf. Supplemental Admin. R. at 5.)

C. Labor shall consider the arguments made in Plaintiffs' 56.1 Motion regarding a shift in production in light of the data contained in the October 17 information and conduct further investigation as necessary.

In the *Remand Results*, Labor reiterates its conclusion that the only shift in production was a domestic shift to an affiliated plant in Harrisburg, Pennsylvania; therefore, Plaintiffs are not eligible for certification under 19 U.S.C. § 2331(a)(1)(B). (Pub. Supplemental Admin. R. at 18.) Contrary to the statement in Defendant's motion for voluntary remand, the *Remand Results* do not contain "a more detailed factual and/or legal analysis" to support the conclusion that a shift in production to Mexico did not occur. (Def.'s Unopposed Mot. for Voluntary Remand at 2.) The only mention of a shift in production is contained in Labor's discussion of increased imports: "[the increase in imports occurred] after the decision by the subject firm to transfer production to Harrisburg, Pennsylvania and during the time of the completion of the domestic transfer." (Pub. Supplemental Admin. R. at 18.) The record does not indicate that Labor conducted any further investigation on remand regarding the alleged domestic transfer. Instead, Labor's statement would seem to indicate that Labor merely relies on the initial investigation. In seeking a voluntary remand after the initial investigation, Labor in essence conceded that the initial investigation was inadequate. (*See* Def.'s Unopposed Mot. for Vol. Remand at 2 (asserting that "[a]fter review of the administrative record in light of the arguments petitioners made in their 56.1 motion, defendant seeks a remand to Labor to conduct a further investigation and make a redetermination").) Labor's denial of Plaintiffs' eligibility for certification based on the initial investigation into a shift in production falls short of the reasoned analysis that is required to support Labor's conclusion.

The only information in the record that supports Labor's conclusions in the *Remand Results* are unverified statements from an untitled Tyco

Electronics company official and the two customer surveys discussed above. (*See* Letter from Tom Christner Responding For Shane North-Craft [sic], Tyco Electronics, Middleton [sic], Pennsylvania to Elliot Kushner of 11/13/02, Conf. Supplemental Admin. R. at 4–5.) During the reconsideration investigation, Labor obtained information from Tyco Electronics company officials during a telephone conference regarding the shift in production. (*See* Notes to Conference Call concerning Tyco Electronics, Fiber Optics Division, Glen Rock, Pennsylvania with Steve Reynosa and Sue Mullins and others on January 14, 2002, Conf. Admin. R. at 66–67.)

Although Labor may appropriately rely on the unverified statements of company officials, *see, e.g., International Union, UAW Local 1283 v. Reich,* 20 F. Supp. 2d 1288, 1297 n.15 (Ct. Int'l Trade 1998); *United Steel Workers of America, Local 1082 v. McLaughlin*, 15 CIT 121, 122 (1991), such unverified statements "will not amount to substantial evidence if [they are] contradicted by logic or other pertinent information in the record." *Former Employees of Pittsburgh Logistics Systems, Inc., v. United States Sec'y of Labor,* No. 02–387, slip op. at 15, 2003 Ct. Int'l Trade LEXIS 18, at *24 (Ct. Int'l Trade Feb. 28, 2003). As stated above, Labor failed to consider the October 17 information which, Plaintiffs contend, contains statements that contradict the Tyco Electronics officials' statements regarding a shift in production to Mexico. (Pls.' Br. at 17.) Such evidence, if properly considered by Labor, might suggest that Tyco Electronics' assertions are unsubstantiated and should be disregarded. By failing to even examine the data provided by Plaintiffs, Labor's *Remand Results* are not supported by substantial evidence in the record or otherwise in accordance with law.

On remand, Labor shall reexamine Plaintiffs' eligibility for certification under 19 U.S.C. § 2331(a)(1)(B). The remand results should set forth Labor's factual and legal analysis regarding a possible shift in production and include analysis of the October 17 information supplied by Plaintiffs. Labor should conduct any further investigation that is necessary to determine Plaintiffs' eligibility under § 2331(a)(1)(B).

II. Plaintiffs' Motion for Certification is Denied.

Although Plaintiffs' arguments regarding why certification in this matter is appropriate have merit, the Court finds that an additional remand to Labor for further investigation is necessary to fully develop the administrative record before the Court. However, as the Court has warned in the past, "[s]hould Labor not perform a competent * * * investigation upon remand, the Court will not remand for [an additional] investigation." *Barry Callebaut*, 177 F. Supp. 2d at 1312. Because the Court is ordering an additional remand, the Court declines to address Defendant's contentions regarding the authority of this Court to order certification.

CONCLUSION

Plaintiffs' Motion for NAFTA-TAA Certification is denied. This matter is remanded to the Department of Labor for further consideration

and investigation of 1) the October 17 information submitted by Plaintiffs; 2) the propriety of conducting an import analysis to support the information contained in the customer surveys, 3) the seemingly contradictory information provided by Tyco Electronics regarding sales; and 4) the arguments made in Plaintiffs' 56.1 Motion regarding a shift in production in light of the data contained in the October 17 information.

(Slip Op. 03–50)

UNITED STATES OF AMERICA, PLAINTIFF *v.* INN FOODS, INC., DEFENDANT

Court No. 01–01106

Defendant, Inn Foods, Inc. ("Inn Foods"), moves to dismiss the Complaint filed by the United States on December 14, 2001, pursuant to USCIT R. 12(c) or, in the alternative, for summary judgment pursuant to USCIT R. 56, for failure to state a claim under 28 U.S.C. § 1582 (2000) and to file a timely complaint. The United States Customs Service ("Customs") commenced this action to recover civil penalties and unpaid duties and fees for violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2000). Inn Foods contends that December 13, 2001, was the last day the five-year statute of limitations under 19 U.S.C. § 1621 (2000) was waived, and argues that this action, commenced one day later, is time-barred as to all the subject entries.

Held: For the reasons stated below Inn Foods' motion for summary judgment is granted.

[Inn Foods' summary judgment motion is granted. Case dismissed.]

(Dated May 13, 2003)

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer*, Senior Trial Attorney, and *Michael S. Dufault)* for the United States of America, plaintiff.

Horton, Whiteley & Cooper (Robert Scott Whiteley and *Craig A. Mitchell)* for Inn Foods, defendant.

MEMORANDUM OPINION

TSOUCALAS, *Senior Judge:* Defendant, Inn Foods, Inc. ("Inn Foods"), moves to dismiss the Complaint filed by the United States on December 14, 2001, pursuant to USCIT R. 12(c) or, in the alternative, for summary judgment pursuant to USCIT R. 56, for failure to state a claim under 28 U.S.C. § 1582 (2000) and to file a timely complaint. The United States Customs Service ("Customs")[1] commenced this action to recover civil penalties and unpaid duties and fees for violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2000). Inn Foods contends that December 13, 2001, was the last day the five-year statute of

[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108–32 (2003).

limitations under 19 U.S.C. § 1621 (2000) was waived, and argues that this action, commenced one day later, is time-barred as to all the subject entries.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1582 (2000).

STANDARD OF REVIEW

USCIT R. 12(c) provides that any party may move for judgment on the pleadings after the pleadings are closed and if it would not delay trial. A USCIT R. 12(c) motion "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Herbert Abstract Co. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (citations omitted). A motion for judgment on the pleadings may be granted if the moving party is entitled to judgment as a matter of law. *See N.Z. Lamb Co. v. United States*, 40 F.3d 377, 380 (Fed Cir. 1994). The Court may convert a motion to dismiss into a motion for summary judgment under USCIT R. 56 if it relies on evidence outside the pleadings. *See* USCIT R. 12(c). "On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988) (citation omitted). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

A ruling on a motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss under USCIT R. 12(b) for failure to state a claim. *See GATX Leasing Corp. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). A district court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (citation omitted).

In deciding a motion to dismiss for failure to state a claim, as well as a USCIT R. 12(c) motion for judgment on the pleadings, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Wendell v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). To avoid dismissal, however, a plaintiff must plead specific facts, and not merely conclusory allegations.

DISCUSSION

I. Background

The United States filed the Complaint to collect Customs duties and fees from Inn Foods for produce imported from Mexico between January 22, 1987 and January 19, 1990. *See* Compl. ¶ 6. Customs alleges that dur-

ing this time, Inn Foods "knowingly aided and abetted" Seaveg, Ltd. ("Seaveg"),[2] also an importer of produce, in the entry or introduction of produce from Mexican suppliers to the United States through the port of Hidalgo, Texas. *See id.* ¶¶ 4, 6. The Complaint claims that Inn Foods and Seaveg entered into identical contracts with "six Mexican growers in which the Mexican growers would sell Inn Foods and Seaveg produce at a prevailing market price as established by Inn Foods' parent company." *Id.* ¶ 7. According to Customs, both Inn Foods and Seaveg maintained accounting records and financial statements for the subject entries reflecting the actual prices paid to the Mexican growers for the produce. *See id.* ¶ 8. The prices declared to Customs, however, "were undervalued and did not reflect the prices actually paid to the Mexican growers." *Id.* The Complaint indicates that Inn Foods and Seaveg were notified of this fact by Customs in April 1989, but despite this notice, both companies continued to enter the produce in the same fashion through February 1990. *See id.* ¶ 10. The Complaint adds that the subject entries were

> entered or introduced, into the United States by means of material and false documents, statements, acts and/or omissions, in that Inn Foods knowingly, intentionally, and fraudulently filed or caused to be filed, and/or aided or abetted Seaveg in the filing of entry documents that contained materially false statements or omissions in violation of 19 U.S.C. §§ 1481, 1484, * * * and 1592.

Id. ¶ 11. Therefore, Customs improperly assessed the duties and merchandise processing fees in connection with the subject produce, *see id.* ¶¶ 12, 17, and was deprived of approximately $618,356.85 in lawful duties and $6,245.70 in appropriate fees. *See id.* ¶ 18.

At the request of Customs, Inn Foods waived the five-year statute of limitations defense provided in 19 U.S.C. § 1621 for a two-year period commencing on December 15, 1993, thereby extending the time in which a timely action could be brought against Inn Foods. *See* Def.'s Mot. for J. on the Pleadings or in the Alternative for Summ. J. ("Def.'s Mot.") at Ex. 2; Pl.'s Resp. Def.'s Mot. J. Upon the Pleadings or, in the Alternative, for Summ. J. ("Pl.'s Resp.") Attach. 1; *see also* Compl. ¶ 21. Inn Foods subsequently extended the waiver for three successive two-year periods commencing on the 14th day of December in 1995, 1997 and 1999. *See* Def.'s Mot. at 6 & Exs. 3–5. The United States contends that the December 14, 1999 waiver ("1999 waiver") was effective through December 14, 2001, *see* Compl. ¶ 21, while Inn Foods argues that the relevant waiver expired on December 13, 2001, just one day prior to the date that the Complaint was filed. *See* Def.'s Mot. at 8.

II. Analysis

The statute of limitations applicable to 19 U.S.C. § 1592 actions is set forth in 19 U.S.C. § 1621 providing that "[n]o suit or action to recover any duty under [19 U.S.C. § 1592] * * * or any pecuniary penalty * * * accruing under the customs laws shall be instituted unless such suit or

[2] Seaveg filed for bankruptcy on October 13, 1998, and was formally dissolved on December 1, 1998. *See* Compl. ¶ 4.

action is commenced within five years after the time when the alleged offense was discovered." 19 U.S.C. § 1621. The Customs entries at issue in the Complaint were made between January 22, 1987 and January 19, 1990. *See* Compl. ¶ 6. Although 19 U.S.C. § 1621 would normally render claims regarding entries made within this time period time-barred, in this particular case, Inn Foods waived the five-year statute of limitations defense for a two-year period commencing December 15, 1993, and subsequently extended the waiver for three successive two-year periods at the request of Customs commencing on December 14, 1995, December 14, 1997 and December 14, 1999, respectively. *See* Def.'s Mot. at 6 & Exs. 2–5.

The 1999 waiver, at issue in this motion, specifically states that:

> Inn Foods, Inc. hereby waives the period of limitations contained in Title 19, United States Code, Section 1621, and any other applicable statute(s) of limitations with respect to Customs entries of frozen fruits and vegetables, filed with U.S. Customs during the period of May 1, 1986 through December 31, 1990, for a period from TWO YEARS, *commencing on December 14, 1999.* Inn Foods, Inc. agrees that it will not assert any statutes of limitations defense in any action brought by the United States Government concerning the entries designated above with respect to the TWO-YEAR PERIOD for which the statute of limitations is hereby waived.

Id. at Ex. 5 (emphasis added). Inn Foods argues, and the Court agrees, that the plain language of the waiver would render it effective through the eleventh hour of December 13, 2001, and that a complaint filed the next day is time-barred.

In its response, the United States relies on *United States v. Neman Bros. & Assocs.*, 15 CIT 536, 777 F. Supp. 962 (1991), for the proposition that "two-year waivers of the statute of limitations are valid through the anniversary date of the commencement of the waiver, with the first day of the waiver excluded." Pl.'s Resp. at 2. In *Neman Bros.*, the United States filed its complaint on the one-year anniversary from the effective date of the waiver. *See Neman Bros.*, 15 CIT at 537, 777 F. Supp. at 963. The parties in this current action propound similar arguments to those in *Neman Bros.*, where the court analogized USCIT R. 6(a)[3] to Fed. R. Civ. P. 6(a), both dealing with the computation of time, and ruled in favor of the United States since "[d]efendants did not cite any precedent to support the proposition that the one year waiver does not include the anniversary date." *Neman Bros.*, 15 CIT at 538, 777 F. Supp. at 964. The waiver in *Neman Bros.* was applicable for one year commencing August 1, 1988 and the action was filed on the one year anniversary date, August 1, 1989. *See Neman Bros.*, 15 CIT at 536–37, 777 F. Supp. at 963–64.

The United States also references as support a string of citations, some cited in *Neman Bros.*, that found the anniversary method of computation applicable to specific one-year limitation periods. *See, e.g., Pat-*

[3] USCIT R. 6(a) provides that "[i]n computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included."

terson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (finding Fed. R. Civ. Pro. 6(a) applicable to the Antiterrorism and Effective Death Penalty Act's one-year grace period); *United States v. Marcello,* 212 F.3d 1005, 1010 (7th Cir. 2000) (holding that the anniversary rule should govern "[b]ecause courts do not have stopwatches in hand when deadlines draw near, and because the anniversary date is clear and predictable and therefore easier for litigants to remember, for lawyers to put in their tickler files, and for courts to administer"); *Lawson v. Conyers Chrysler, Plymouth, & Dodge Trucks, Inc.,* 600 F.2d 465, 465–66 (5th Cir. 1979) (finding the anniversary method applicable to the one-year limitation period under the Truth and Lending Act since courts consistently used the anniversary method prescribed by Fed. R. Civ. Pro. 6(a) in computing federal statutory time limits); *see also Krajci v. Provident Consumer Discount Co.,* 525 F. Supp. 145, 150 (E.D. PA 1981) (holding that "[w]here no contrary policy is expressed in a particular statute, considerations of liberality and leniency militate in favor of Rule 6(a)'s application"). These cases, however, do not address the issue of whether R. 6(a) of the Federal Rules of Civil Procedure or the United States Court of International Trade Rules is applicable to a waiver agreement that explicitly designates the day on which a two-year waiver agreement would begin to toll.

But for the four waiver agreements entered into by Inn Foods at the request of Customs to extend the period of time in which the United States could file a timely complaint, the applicable statute would have extinguished all of Customs' claims no later than January 20, 1995. *See* Compl. ¶ 6 (stating that the last day a subject entry was made by Inn Foods was on January 19, 1990); *see also* Def.'s Mot. at 6. If, therefore, the issue at bar was whether the anniversary method, as prescribed by USCIT R. 6(a), would be applicable to computing the last day on which a timely complaint could be filed as prescribed by 19 U.S.C. § 1621, then the Court would answer in the affirmative. However, the case before the Court deals specifically with waiver agreements drafted by Inn Foods in accordance with the form and content prescribed by Treasury Regulations. *See* Def.'s Mot. at 14. *See, e.g.,* T.D. 90–11, 24 Cust. B. & Dec. 25–26 (1990) (outlining the construction of a waiver agreement of the period of limitations prescribed under 19 U.S.C. § 1621).

A waiver is not a contract, *see Florsheim Bros. Drygoods Co. v. United States,* 280 U.S. 453, 466 (1930), but instead "a voluntary, unilateral waiver of a defense." *Strange v. United States,* 282 U.S. 270, 276 (1931) (stating that the insertion of an agency's signature was not intended to convert a waiver into a contract, but instead, to serve a purely administrative function). This is not to say, however, that the actual words of the waivers are not controlling. *See United States v. Hitachi America, Ltd.,* 172 F.3d 1319, 1333–34 (Fed. Cir. 1999). Therefore, the Court must interpret the words of the waiver agreements, and may do so using contract principles. *See Ripley v. Comm'r of Internal Revenue,* 103 F.3d 332, 337 (4th Cir. 1996) (court used contractual interpretation to analyze

consent to a waiver); *Kronish v. Comm'r of Internal Revenue,* 90 T.C. 684, 693 (1988) (court doing same); *Piarulle v. Comm'r of Internal Revenue,* 80 T.C. 1035, 1042 (1983) (court doing same).

"In interpreting the waiver * * * in terms of contract principles, courts have looked to the 'plain meaning' of the [agreement]." *Tolve v. Comm'r of Internal Revenue,* 2002 U.S. App. LEXIS 4731, at *7 (3rd Cir. Mar. 22, 2002); *see also Aleman Food Servs., Inc. v United States,* 994 F.2d 819, 822 (Fed. Cir. 1993) (stating that a court first turns to the plain language when interpreting a contract); *Gould, Inc. v. United States,* 935 F.2d 1271, 1274 (Fed Cir. 1991) (stating that the plain language of a contract is given first consideration when interpreting written agreements). If parties to a mutual waiver dispute any terms of the agreement, then the court will interpret those terms in a manner that would reflect the objective intentions of both parties. *See Firestone Tire & Rubber Co. v. United States,* 444 F.2d 547, 551 (Ct. Cl. 1971) (stating that "the language of a contract must be afforded the meaning derived from the contract by a reasonably intelligent person"); *Singer-Gen. Precision, Inc. v. United States,* 427 F.2d 1187, 1193 (Ct. Cl. 1970) ("It is the objective manifestations which count."); *see also Hitachi,* 172 F.3d at 1334 (stating that "judges should not undermine * * * an agreement reached by * * * sophisticated parties").

In the case at bar, Inn Foods drafted all four waiver agreements in accordance with the applicable Treasury Decision notice. *Compare* Def.'s Mot. at Exs. 2–5, *with* T.D. 90–11, 24 Cust. B. & Dec. at 25–26. On its face, the 1999 waiver at issue explicitly states that it is applicable *"for a period of TWO YEARS, commencing on December 14, 1999." See* Def.'s Mot. at Ex. 5 (emphasis added). This language is unambiguous and, accordingly, this Court finds that the waiver agreement between Inn Foods and Customs explicitly stated that it was to begin on December 14, 1999, and expired at 11:59 p.m. on December 13, 2001 (two years from the effective date of the waiver). The action filed by Customs on December 14, 2001, is therefore untimely.

Even if the language in the waiver agreement was ambiguous, it is Customs' policy to count the operative date from which a waiver is to run as the date of the waiver itself. *See* T.D. 90–11, 24 Cust. B. & Dec. at 25 (stating that a waiver "commences from the date of the waiver" and extends for a period of not less than two years). Since Customs itself has drafted the format for requesting acceptance of a waiver of the period of limitations, the Court must construe the language against Customs. According to the applicable Treasury Decision, "the two-year period ordinarily commences from the date of the waiver, unless another commencement date is specified by the waiving party." T.D. 90–11, 24 Cust. B. & Dec. at 25. Therefore, in this case, tolling of the waiver began on December 14, 1999.

CONCLUSION

Since this Court finds that the 1999 waiver explicitly states that Inn Foods extended its waiver of the period of limitations prescribed in 19

U.S.C. § 1621 for a period of two years, commencing on December 14, 1999, such language renders the United States' Complaint, filed on December 14, 2001, untimely. Moreover, because the waivers themselves were first attached to Defendant's Motion, and since the applicable Treasury Decision was not referenced in the pleadings, the Court will grant Inn Food's motion for summary judgment. Judgment will be entered accordingly.

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